

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A37 617 146 - Napanoch

Date:

In re: LUIS ALBERTO MAINGON-ORELLANA

MAR - 7 1996

IN DEPORTATION PROCEEDINGS

INDEX

APPEAL

ON BEHALF OF RESPONDENT: Howard L. Baker, Esquire
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ON BEHALF OF SERVICE: Adam Opaciuch
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(ii), I&N Act [8 U.S.C.
§ 1251(a)(2)(A)(ii)] - Convicted of crimes
involving moral turpitude

Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C.
§ 1251(a)(2)(A)(iii)] - Convicted of aggravated
felony

Sec. 241(a)(2)(C), I&N Act [8 U.S.C. § 1251(a)(2)(C)] -
Convicted of firearms violation

APPLICATION: Waiver of inadmissibility

The respondent appeals from a June, 1, 1995, decision of an Immigration Judge finding him deportable as charged, determining him to be ineligible for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and ordering him deported to Ecuador. A request the respondent has made for oral argument before this Board is denied as a matter of discretion. See 8 C.F.R. § 3.1(e). The record will be remanded to the Immigration Judge for further proceedings.

The respondent is a 21-year-old native and citizen of Ecuador. The record indicates that he has been a lawful permanent resident of this country since April 1, 1983. On December 23, 1994, an Order to Show Cause was issued charging the respondent with deportability under section 241(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1251(a)(2)(A)(ii), as an alien who has been convicted of two crimes involving moral turpitude; under section 241(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1251(a)(2)(A)(iii), as an alien convicted of an aggravated felony; and under section 241(a)(2)(C) of the

Act, 8 U.S.C. § 1251(a)(2)(C), as an alien convicted of a firearms violation. For reasons that will become apparent below, we have limited our review of deportability to the charge based on the firearms violation.

Section 241(a)(2)(C) of the Act reads as follows:

Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

On appeal, the respondent contends that Immigration Judge erred in finding that he is deportable under section 241(a)(2)(C) of the Act and that he is therefore ineligible for relief from the other grounds of deportability under section 212(c) of the Act. See Matter of Esposito, Interim Decision 3243 (BIA 1995); Matter of Chow, Interim Decision 3199 (BIA), aff'd, Chow v. INS, 9 F.3d 1547 (5th Cir. 1993).

The basis for the charge of deportability under section 241(a)(2)(C) of the Act is the respondent's conviction on August 19, 1994, for robbery in the first degree under N.Y. Penal Law § 160.15(4), which provides as follows:

Robbery in the first degree: A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime. (Emphasis supplied).

The respondent's criminal record indicates that his conviction involved displaying something that appeared to be a pistol (Exh. 3).

The Service contends that the respondent's first degree robbery conviction is sufficient to sustain a charge of deportability under section 241(a)(2)(C) of the Act even though the respondent may not have actually used a firearm.

We agree with the respondent that a conviction for first degree robbery under N.Y. Penal Law § 160.15(4) does not support a charge of deportability under section 241(a)(2)(C) of the Act.

The Court of Appeals of New York has stated that in order for a defendant to be found guilty under N.Y. Penal Law § 160.15(4) for displaying what appears to be a pistol, the following elements must be established:

1. The defendant must consciously display something that could reasonably be perceived as a firearm with the intent of compelling an owner of property to deliver it up or for the purpose of preventing or overcoming resistance to the taking; and
2. The display must actually be witnessed in some manner by the victim, i.e., it must appear to the victim by sight, touch, or sound that he is threatened by a firearm.

People v. Baskerville, supra, at 756 (N.Y. 1983) (citations omitted).

When these requirements are satisfied, however, "the true nature of the object displayed is, as concerns criminality, irrelevant." Id. Accordingly, a robber who holds and uses a black object covered by a towel in such a manner as to give his victims the impression that he is threatening them with a gun displays "what appears to be" a firearm within the meaning of the statute. Id. Similarly, convictions for first degree robbery have been upheld where the defendant reached into his bulky pocket, although he did not announce the possession of a firearm, People v. Broadhead, 579 N.Y.S.2d 135 (N.Y. App. Div. 1992), where the defendant placed his hand inside his vest "as if he had a gun," People v. Lopez, 522 N.Y.S.2d 145 (N.Y. App. Div. 1987), aff'd, 538 N.Y.S.2d 788 (N.Y. 1989), and where the defendant pulled an object wrapped in paper out of a box and stuck the object in the victim's side, People v. Saez, 505 N.E.2d 945 (N.Y. 1987).

The State of New York need only prove that the defendant consciously displayed something that could reasonably be perceived as a firearm with the intent of compelling an owner of property to deliver it up or for the purpose of preventing or overcoming resistance to the taking and that the display was witnessed by the victim. The affirmative defense provided in the statute does not serve to negate any facts of the crime which the State of New York must prove in order to convict a defendant of robbery in the first degree, i.e., it does not negate the finding that the defendant displayed what appeared to be a firearm. Instead, the affirmative defense constitutes a separate issue on which the defendant is required to carry the burden of persuasion.

We note that in People v. Felder, 334 N.Y.S.2d 992 (N.Y. App. Div. 1972), aff'd 344 N.Y.S.2d 643 (1973), the court, in upholding the constitutionality of N.Y. Penal Law § 160.15(4), stated that the legislature "has, in effect, created a presumption that the firearm displayed during the course of a forcible theft of property was loaded, operable and capable of causing serious physical injury." Id. at 995. However, the court also noted that the "People must still establish every element of the substantive crime." Id. at 998. Since that decision, the courts have determined that once the requirements of N.Y. Penal Law § 160.15(4), as outlined earlier, have been satisfied, the true nature of the object displayed is irrelevant. Despite the language of the court in People v. Felder, supra, subsequent case law has made clear that no further facts must be presumed or inferred in order to constitute the crime of robbery in the first degree. See, e.g., People v. Baskerville, supra; People v. Broadhead, supra; People v. Lopez, supra.

In view of the above, we conclude that the display of a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) is not an element of the offense of robbery in the first degree under N.Y. Penal Law § 160.15(4). Accordingly, a conviction for robbery in the first degree pursuant to N.Y. Penal Law § 160.15(4) cannot serve as the basis for deportability under section 241(a)(2)(C) of the Act. As the respondent's deportability under section 241(a)(2)(C) of the Act has not been established, the record will be remanded to the Immigration Court to allow the respondent an opportunity to apply for section 212(c) relief.

ORDER: The appeal is sustained with respect to the Immigration Judge's deportability determination under section 241(a)(2)(C) of the Act.

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FURTHER ORDER: The record is remanded to the Immigration Court to accept an application for a waiver of inadmissibility under section 212(c) of the Act and for the entry of a new decision in accordance with the foregoing opinion.

Ray McGuire Davis
FOR THE BOARD